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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 311

MORRIS LIPSITZ and MORRIS LIPSITZ and HELEN LIPSITZ, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 12, 1955 (App. infra, p. 8 R. 159), based on an opinion of said Court promulgated April 12, 1955 (App., infra, p. 1, R. 151) affirming the decisions of the Tax Court of the United States entered July 15, 1954 (R. 33). Said judgment of the Court of Appeals became a final judgment of that Court on May 18, 1955, when the Court denied the petition for rehearing filed on May 11, 1955 by these petitioners (App., infra, p. 10, R. 184).

OPINIONS BELOW

The Findings of Fact and Opinion of the Tax Court of the United States promulgated March 18, 1954 (R. 2) is reported in 21 T.C. 917.

The opinion of the Court of Appeals, promulgated April 12, 1955 (App., infra, p. 1, R. 151) affirming the decisions of the Tax Court entered July 15, 1954 is reported in 220 F. (2d) 871.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit, 220 F.(2d) 871 (App., infra, p. 1, R. 151) was promulgated April 12, 1955. The judgment of the Court of Appeals was entered April 12, 1955 (App., infra, p. 8, R. 159).

On May 11, 1955, petitioners filed with the Court below a petition for rehearing. Motion for a stay of mandate was filed on May 12, 1955. On May 13, 1955, the Court of Appeals entered its order staying mandate pending the action of the Court on the petition for rehearing (App., infra, p. 9, R. 184).

On May 18, 1955 the Court below entered its order denying the petition for rehearing (App., infra, p. 10, R. 184).

The judgment of the Court below did not become final, so that certiorari could be sought as to the same, until May 18, 1955 when the United States Court of Appeals for the Fourth Circuit denied petitioners' motion for rehearing. *United States* v. *Ellicott*, 223 U.S. 524, 32 S. Ct. 334; *United States* v. *Cresent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254; *Kingman & Co.* v. *Western Mfg. Co.*, 170 U.S. 675, 680, 681, 18 S. Ct. 786.

QUESTIONS PRESENTED

1. Whether all the income from properties, owned by petitioners (husband and wife) as tenants by the entirety in the State of Maryland, is taxable to the husband for Federal income tax purposes.

2. Whether the Court below erred by failing to follow the law of the State of Maryland and the decisions of this Court in *Poe* v. *Seaborn,* 282 U.S. 101, 51 S. Ct. 58; *Goodell* v. *Koch,* 282 U.S. 118, 51 S. Ct. 62; *Hopkins* v. *Bacon,* 282 U.S. 122, 51 S. Ct. 62; and *United States* v. *Malcolm,* 282 U.S. 792, 51 S. Ct. 184 by deciding in this case that all of the income from properties owned by petitioners as tenants by the entirety in the State of Maryland is taxable to the husband, Morris Lipsitz.

3. Was petitioner, Morris Lipsitz, taxable only on one-half of the income from the properties owned by him and his wife as tenants by the entirety in the State of Maryland?

4. Did the Court below err in sustaining deficiencies against Petitioner Morris Lipsitz based upon a net worth statement that included property and computed income belonging to petitioner's wife and also omitted valuable property which respondent's agent admitted he failed to include at the crucial beginning point of the net worth statement?

5. Whether the Court below erred by affirming the Tax Court of the United States in totally disregarding the testimony of petitioners' expert witnesses and reaching an "independent conclusion of its own" as to the fair market value of an ice plant owned by petitioners as of June 30, 1937.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 21. NET INCOME.

(a) Definition—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

ARTICLE 45—SECTION 4 ANNOTATED CODE OF MARYLAND (FLACK) 1951:

Married women shall hold all their property of every description for their separate use, as fully as if they were unmarried, and shall have all the power to dispose of by deed, mortgage, lease, will or any other instruments that husbands have to dispose of their property, and no more.

STATEMENT OF THE CASE

The petitioners are husband and wife and during the years here involved resided at 4201 Fernhill Avenue, Baltimore, Maryland. The husband, Morris Lipsitz, filed separate individual Federal income tax returns for the years 1938, 1939, 1940, 1941 and 1944. For the years 1942, 1943 and 1945, the petitioners filed joint returns.

As found by the Court below, the petitioners owned in the State of Maryland a substantial amount of property as tenants by the entirety. In determining against the petitioner Morris Lipsitz deficiencies in Federal income tax for the years 1938, 1939, 1940, 1941 and 1944, the Tax Court of the United States held that all the income from assets owned by the petitioners, husband and wife, as tenants by the entirety, was taxable in toto to the husband, Morris Lipsitz. The Court of Appeals affirmed this decision of the Tax Court (App., infra, p. 8, R. 158).

The income from the properties owned by petitioners as tenants by the entirety was computed by the Commissioner on the net worth basis and so determined by the Tax Court.

During the year 1941, the petitioners sold to the Merchants Terminal Company of Baltimore, Maryland ice plant properties known as the Warner Ice Company for $57,500. Petitioners reported no income from this transaction contending that they had sustained a loss. The Tax Court determined, however, that they had derived a capital gain of $17,357.49. (Findings of Fact of Court below, App., infra, p. 4, R. 154).

The test in determining whether there was a gain or loss from the transaction was the cost basis of the properties sold. All parties agreed that the selling price was $57,500. The crucial question in determining the cost basis of the properties was their fair market value as of June 30, 1937. The Tax Court found a fair market value of the properties at this basic date of $36,000. (Findings of Court below, App., infra, p. 5, R. 155). The Court below affirmed.

A distinguished array of disinterested experts testified for petitioners as to the fair market value of these assets as of June, 1937. The Tax Court itself found that these

experts were disinterested and reputable. (R. 28).

The petitioners' experts were as follows:

Allen Kenny, Superintendent of Manufacturing for the American Ice Company, Baltimore, Maryland and Washington, D. C. and formerly Chief Operating Engineer for the American Ice Company (R. 87).

Walter C. Hanneman of Waltham Welding Works (R. 136).

John M. Lambert of York Corporation, York, Pennsylvania. He had been erecting engineer, estimator, design engineer, branch manager and, at the time of testifying, was Divisional Manager of that corporation (R. 140).

William B. Spencer, Chief Engineer of Consolidated Engineering Company (R. 146).

Norman Mack of Millicent Construction Company

Honorable Norris O. Burgee, Appraiser for the City of Baltimore (R. 80).

The lowest fair market value for the plant and machinery of the corporation as given by the experts was $75,000.

The testimony of these experts was not rebutted by the Commissioner who offered no evidence as to the fair market value of the properties on June 30, 1937. The Tax Court ignored the testimony of the experts and reached an unexplained independent conclusion of its own that the fair market value as of June 30, 1937 was $36,000 (R. 12).

In affirming the Tax Court, the Court below also totally ignored the testimony of the petitioners' expert witnesses as to the fair market value of the properties on

June 30, 1937 and failed to mention this evidence in its opinion (App., infra, pp. 1-8).

The opinion of the Court of Appeals was promulgated on April 12, 1955 (App., infra, p. 1). The Court's judgment was entered on April 12, 1955 (App., infra, p. 8).

On May 11, 1955, petitioners filed with the Court below a petition for rehearing and on May 12, 1955 a motion for stay of mandate.

On May 13, 1955 the Court of Appeals entered an order staying mandate, pending the action of the Court on the petition for rehearing (App., infra, p. 9, R. 184).

On May 18, 1955, the Court of Appeals entered its order denying the petition for rehearing (App., infra, p. 10, R. 184).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals involves a substantial question of Federal tax law, particularly important to citizens domiciled in the State of Maryland. We respectfully urge that this Court should exercise its power of supervision and protect the property rights of those domiciled in Maryland with respect to taxation by the Federal Government as in the past this Court has preserved under similar circumstances the property rights of the residents of the States of Washington, Arizona, Texas and California in *Poe* v. *Seaborn*, 282 U.S. 101, 51 S. Ct. 58; *Goodel* v. *Koch*, 282 U.S. 118, 51 S. Ct. 62; *Hopkins* v. *Bacon*, 282 U.S. 122, 51 S. Ct. 62 and *United States* v. *Malcolm*, 282 U.S. 792, 51 S. Ct. 184.

In the cases named above, this Court held that husbands and wives domiciled in the States named above are entitled to file separate returns in which each may return

one-half of the income from property known as "community property" in those States.

We think that the decision of the Court below does not follow and is contrary to the decisions of this Court in *Poe* v. *Seaborn*, supra, *Goodel* v. *Koch*, supra, *Hopkins* v. *Bacon*, supra and *United States* v. *Malcolm*, supra, in holding and deciding that Morris Lipsitz, the husband, was required to report in his separate income tax returns filed for the years 1938, 1939, 1940, 1941 and 1944 *all the income* from the properties owned by himself and wife as tenants by the entirety under the law of the State of Maryland. The Court of Appeals said (App. infra p. 2):

• • • •

"• • • The record before us shows that during the years 1938 through 1944 Lipsitz and his wife owned a substantial amount of property as tenants by the entirety. In determining deficiencies against Lipsitz for the years in which he filed individual returns, the Tax Court treated all income earned on assets owned by Lipsitz and his wife as being taxable to Lipsitz. Lipsitz now contends that he should have been taxed upon only half the income from property owned by him and his wife as tenants by the entirety.

"It is well settled that the measure of title, and the rights thereto incident, in property held by husband and wife under a tenancy by the entirety, are to be determined here by the law of Maryland. And under that law, each spouse, husband and wife, is ordinarily entitled each to one-half of the income from such property. *Masterson* v. *Masterson*, 129 Md. 167, 98 Atl. 537. • • •"

• • • •

The Court then held that this case constituted an exception to the general rule because the husband controlled the management of the properties and that there was a clear agreement, followed by long continued practice that the income from the properties held by the husband and wife as tenants by the entirety, should be con

sidered in all respects as the income of the husband. The Court said with respect to the control of the properties by the husband (App., infra, p. 3, R. 153):

* * * *

"* * * He completely controlled the properties, made all decisions as to the purchase and sale of the properties. Indeed, Mrs. Lipsitz had so little connection with these properties that she failed to appear at the lengthy trial before the Tax Court. In reality, it was the husband who actually earned this income. There is nothing in the record to indicate that Mrs. Lipsitz either paid any commission to her husband for her share of the rentals collected or compensated him for his labor, materials and business acumen in the premises."

* * * *

This was the same argument that was made by the Government in *Poe* v. *Seaborn*, supra. The point was overruled by this Court in *Poe* v. *Seaborn*, supra, as follows:

* * * *

"The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions. The powers of partners, or of trustees of a spendthrift trust, furnish apt analogies.

"The obligations of the husband as agent of the community are no less real because the policy of the State limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers,

by no means negatives the wife's present interest as a co-owner.

"We are of the opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."

• • • •

That the Court below misinterpreted the law of the State of Maryland with respect to "control" and "management" by the husband is demonstrated by the decision of the Maryland Court of Appeals in *Whitelock* v. *Whitelock*, 156 Md. 115, 143 Atl. 712, involving not only the principal sum of a mortgage, all of which was being claimed by the husband and one-half by the wife, but accumulated interest thereon. The court stated the prevailing law in this way:

• • • •

"At common law, the appellant, by virtue of his control of the wife's property, would have been entitled to all of the income. As affected by statute, however, from time to time, the control of the husband over the wife's property has changed, until now, under the Married Women's Property Acts (Code Pub. Gen. Laws 1924, art. 45, Sections 1-21) in this state the wife shares equally with the husband in the income from a tenancy by the entireties. The authority for this statement is *Masterman* v. *Masterman*, 129 Md. 167, 98 A. 537, in which the history of tenancy by the entireties, with the changes wrought by statute in the respective rights of husband and wife therein, have been so exhaustively treated in the opinion of Chief Judge Boyd that a discussion of the subject here would involve nothing but needless repetition. *Furstenburg* v. *Furstenberg*, 152 Md. 247, 136 A. 534, 35 A.L.R. 151."

• • • •

In *Masterman* v. *Masterman*, 129 Md. 167; 98 Atl. 537, the Court of Appeals for the State of Maryland held that

in Maryland a judgment is not good against the property of husband and wife for the debt of the husband.

The Court, in *Masterman* v. *Masterman*, cited *Brewer* v. *Bowersox*, 92 Md. 567, 48 Atl. 1060. In that case the Court said:

> "• • • It is not because a conveyance or gift is made to a husband and wife as joint tenants that the estate by the entireties arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and, since in the contemplation of the common law they are but one person, and can only take, not by moieties, but entirety. • • •"

The Court, in *Brewer* v. *Bowersox*, supra, pointed out that the marital relation gives rise to the peculiar estate of tenancy by the entirety when a conveyance is made to husband and wife and that they hold "as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife".

The Court below relied on *Brell* v. *Brell*, 143 Md. 443, 122 Atl. 635 (App., infra, p. 3, R. 153). In that case the husband and wife owned a small farm in Maryland, which was sold for about $5,800. The buyer paid down $1,800 to the husband and gave a mortgage to the husband and wife for $4,000. The wife released the mortgage to her husband on his promise that the money would be invested or deposited in a bank under their joint names. The husband bought property under his own name and kept the income. The wife brought suit for her share of the money.

The Maryland Court of Appeals held that the wife was not entitled to her half of a sum of money paid out to the son, of the parties involved, in payment for a loan. The Court also held that the wife was not entitled to a return of any of the money spent by the husband for living costs. The Court so held because the wife *had agreed*

to the payment to the son and the spending of the money for living costs. The Court held, however, that the wife was entitled to half of the balance of the monies invested by the husband. The Court further held that a trustee should be appointed to take charge of the property and pay over one-half of the income to the wife and one-half to the husband, the corpus to be paid over to the survivor upon the death of either party.

It is most respectfully submitted that the *Brell* case sustains the position of the petitioners here and not the respondent. Although the husband controlled the property in the *Brell* case, the Maryland Court of Appeals (citing *Masterman* v. *Masterman*, supra) held that the wife was entitled to half the income therefrom with the exception of the payment to the son and the monies paid for living costs to which payments the wife had agreed.

It is not clear upon what evidence the Court of Appeals relied in concluding that there was a clear agreement, followed by long continued practice, that the income from the tenancy by entirety properties should be considered in all respects that of the husband. (App., infra, p. 3, R. 153).

Apparently the Court relied upon the element of control and management by the husband which has been discussed hereinabove. Clearly under Maryland law there is no obligation on the part of the wife to pay her husband a commission for collecting her rentals or to compensate him for his labor or business acumen as alluded to by the Court below (App. p. 3, R. 154) and the Court cites no authority for such a proposition.

The Court relied in part on the testimony of Lipsitz for it said (App., infra, p. 4, R. 154):

* * * *

"Further, Lipsitz again and again testified that he considered this income as his own. For example, in response to a question, he stated: 'It didn't belong to me, it belonged to my wife. *It is mine just the same.*' (Italics ours.) • • •"

• • • •

The language used by Lipsitz, quoted above, simply expresses the layman's view of the law and does not show any agreement between husband and wife. It is a coincidence that his expression was similar to language used in the books and quoted by this Court in *Poe* v. *Seaborn*, supra, as follows:

• • • •

"The books are full of expressions such as 'the personal property is just as much hers as his' (Marston v. Rue, 92 Wash. 129, 159 P. 111, 112): 'her property right in it (an automobile) is as great as his' (ID. 92 Wash. 133, 159 P. 111, 113); 'the title of one spouse therein was a legal title, as well as that of the other' (Mabie v. Whittaker, 10 Wash. 663, 39 P. 172, 175).

That the wife did not agree that the income belonged to her husband but in fact shared control thereof is further shown by testimony of record. Lipsitz testified as follows (R. 57):

"Q Well, now, is that money, that $3500, Mr. Lipsitz invested substantially in ground rents, or were there some other investments? A No, ground rent. She wouldn't let me invest in nothing else except ground rent."

He further testified (R. 55):

"Q How much cash did you have, if you know of your own knowledge, at the end of 1941? A In 1941, the money didn't belong to me, it belonged to my wife from the sale of the ice station, 672 West Franklin Street, corner of Pine, and that was her share for an investment at that time, $10,000, she kept it in the vault, and later she invested in ground rent."

The Court of Appeals also relied in part on a discussion between the Tax Court and counsel for petitioners for it said:

> "• • • In colloquy between counsel for Lipsitz and the Court this interchange occurred:
> 'The Court: 'Now do I understand both parties to agree that the assets of both these Petitioners may be considered together?'
> 'Mr. Luce: 'Yes, your Honor; and it is the way the net worth statements have been set up.' (App., infra, p. 4, R. 154).

The above colloquy between Court and counsel does not support the proposition that there was a clear agreement between the husband and wife that the income from the properties should be considered in all respects that of the husband.

It is perfectly true that, in the net worth statements, the assets of both the husband and wife, the tenancy by entirety properties, were included by all parties to the proceeding. This has to be so because the properties were held as tenants by the entirety. We respectfully suggest, however, that inclusion of the properties held as tenants by entirety in the net worth statements does not create a situation whereby the law of Maryland can be changed to tax all the income from these properties to the husband as his sole income.

Also it must be remembered that all parties agree that for the years 1942 and 1943 Lipsitz and his wife filed joint returns and jointly reported the income. (App., infra, p. 1, R. 3).

There is no evidence of record that Mrs. Lipsitz either agreed or impliedly agreed that the income from the property was that of her husband. The Court below apparently relied upon statements made in the brief for the Commissioner of Internal Revenue for such a finding is not supported in any sense by the record.

This case stands alone in taxing to the husband all the income from property held in Maryland by a husband and wife as tenants by the entireties. The other decided cases and rulings hold that the income from such properties owned in Maryland is taxable in equal shares to the husband and the wife.

Elsie S. Bour v. *Commissioner,* 23 T.C. No. 35, November 17, 1954.

George E. Saulsbury v. *Commissioner,* 27 B.T.A. 744, citing *Poe* v. *Seaborn,* supra.

I.T. 1670, June, 1923, Internal Revenue Cumulative Bulletin II-1, January-June, 1923, p. 146 (Internal Revenue Ruling).

Prentice-Hall "Federal Taxes" 1955 Edition, Volume I, Paragraph 7211, at page 7170.

The decision of the Court below is also in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Commissioner* v. *Hart,* 76 F. (2d) 864, affirming 27 B.T.A. 528. This case interprets the laws of the State of Michigan with respect to the taxation of property owned by husband and wife in that state.

We respectfully submit that the Married Women's Acts of Maryland have created sacred rights for the protection of wives and their interests in property which cannot be lightly set aside. We think that a right in real property cannot be relinquished by the wife except by written agreement. Otherwise, any so-called understanding would be in violation of the Statute of Frauds. Here, we submit, there was neither a written nor oral agreement between the spouses and the wife's right cannot be set aside by implication. In Maryland, a judgment against the husband is neither good against property owned by the wife and husband in the entireties nor is a lien against

the husband valid upon property held by the husband and wife as tenants by the entireties. *Masterman* v. *Masterman,* supra; *Brewer* v. *Bowersox,* supra.

Congress has made the operation of the tax law, in such a case as this one, wholly dependent upon State law and the law of the State of Maryland must be given conclusive effect in determining ownership and Federal tax liability based thereon. *Immaculata Gallagher* v. *Smith,* and cases cited therein, (CA 3, June 3, 1955), Paragraph 9485, Commerce Clearing House Federal Tax Service, 1955.

II.

The Court below erred in sustaining the opinion and decision of the Tax Court by failing to apply the principles applicable to net worth cases laid down by this Court in *Holland* v. *United States,* 348 U.S. 121 and *Smith* v. *United States,* 348 U.S. 147.

As developed herein above, the net worth determination of income by the Tax Court taxes to petitioner Morris Lipsitz for the years 1938, 1939, 1940, 1941 and 1944 the individual tenancy by the entirety income of his wife, Helen Lipsitz. The result is a distorted net worth computation which penalizes the petitioner Morris Lipsitz by including income and property belonging to his wife and thus reaches an erroneous determination of the petitioner's net worth at the beginning and close of each year.

In *Holland* v. *United States,* supra, and *Smith* v. *United States,* supra, this Court pointed out the "importance of accuracy" in determining a computation of income by the net worth basis.

In two very recent decisions, the Sixth and Eighth Circuits applied the principles enunciated by this Court to

civil tax decisions of the Tax Court based on net worth computations.

In *Anthony* v. *Thomas et al.* v. *Commissioner* (June 14, 1955) Paragraph 72,773, Prentice-Hall Federal Taxes 1955, The United States Court of Appeals for the Sixth Circuit said:

• • • •

"By contrast, the four net worth cases recently considered by the Supreme Court, and many of the net worth decisions of the lower federal courts cited by petitioners, were criminal cases, where the presumption was in favor of the taxpayers, and the Government had the obligation of establishing their guilt beyond a reasonable doubt. *Holland* v. *United States,* 348 U.S.121 (1954); *Friedberg* v. *United States,* 348 U.S. 142 (1954); *Smith* v. *United States,* 348 U.S. 147 (1954); *United States* v. *Calderon,* 348 U.S. 160 (1954).

"Yet, although the petitioners here had the burden of proving that the Commissioner's determination were wrong, if they did so, it was not incumbent upon them to prove that they owed no tax, or what was the tax that they did owe. *Taylor* v. *Commissioner,* 70 F. (2d) 619, 621 (2 Cir., 1934), affirmed, 293 U.S. 507 (1935). '(W)here it is apparent from the record that the Commissioner's determination is arbitrary and excessive, the taxpayer is not required to establish the correct amount that lawfully might be charged against him, and he is not required to pay a tax that he obviously does not owe. In proceedings before the Tax Court, as distinguished from suits for refund in the District Court, it is sufficient to show that the Commissioner's determination is invalid. Upon such a showing the case should be remanded to the Tax Court for further hearings on the point involved.' *Durkee* v. *Commissioner,* 162 F. (2d) 184, 187 (6 Cir., 1947). See *Boston & M. R.R.* v. *Commissioner,* 206 F. (2d) 617, 626 (1 Cir., 1953)."

• • • •

The Court, in the *Thomas* case, found that the decision of the Tax Court was inaccurate and reversed and remanded the case for the taking of further evidence and a finding of petitioners' cash on hand at the commencement and termination of each of the tax years involved.

The United States Court of Appeals for the Eighth Circuit reached a similar conclusion in *Anthony Marcella and Bessie Marcella* v. *Commissioner* and reversed the Tax Court (June 1, 1955), Paragraph 72,743, Prentice-Hall Federal Taxes, 1955.

We respectfully submit that the decision of the Court below is in conflict with the decisions of the Sixth and Eighth Circuits named above and violates the guiding instruction of this Court in *Holland* v. *United States,* supra, and *Smith* v. *United States,* supra, which, we respectfully submit, are applicable to civil as well as criminal cases.

In the instant case, respondent's agent Carney admitted that he failed to give the petitioners credit at the crucial beginning point for at least three valuable properties.

Respondent's agent testified as follows (Minutes of Hearing 887-8):

"By Mr. Luce:

* * * *

"Q Have you given the taxpayer credit for any costs at all on 1324 Whatcoat Street in your net worth statement? You have not, have you, anywhere?

"A It appears not, Mr. Luce.

"Q How about 1335 Whatcoat Street? Have you given the taxpayer credit for either cost or improvements on that property?

* * * *

"The Witness: No, sir.

"By Mr. Luce:

"Q What about 1371 Whatcoat? Did you give the taxpayer any credit for that property as to cost or improvements?

"A No, sir."

The findings of the Tax Court sustained by the Court below gives no credit at the crucial beginning period for the ownership of these properties. As was said by this Court in *Holland* v. *United States,* supra:

> "* * * The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

We respectfully submit that the Commissioner's determinations in this case were arbitrary and excessive, substantially based upon taxing in a net worth statement the wife's income and property interests to the husband and omitting valuable properties owned at the crucial beginning period.

Thus the position of the respondent, Commissioner, in this case becomes untenable because it is admitted by all parties concerned that Helen Lipsitz was the owner, under State law, of half of the property here involved. The record shows no investigation of her income, no transfer of the properties by her to her husband and no income tax determined against her except for the years 1942, 1943 and 1945 when joint returns were filed reporting the income from the properties. Under the law of the State of Maryland she was the owner of one-half of the properties here involved; hence her contribution or interest in the assets was used by respondent to increase the husband's net worth which, under the erroneous decisions of the Courts below, became the individual separate income of the petitioner Morris Lipsitz.

We respectfully submit that the decision of the Court below should be reversed. *Taylor* v. *Commissioner,* 70 F. (2d) 619, 621 (CA 2, 1934), affirmed 293 U.S. 507 (1935); *Marcella* v. *Commissioner,* supra; and *Thomas et al.* v. *Commissioner,* supra.

Congress has made the operation of the tax law, in such a case as this one, wholly dependent upon State law and the law of the State of Maryland must be given con-

clusive effect in determining ownership and Federal tax liability based thereon. *Immaculata Gallagher* v. *Smith* and cases cited therein (CA 3) June 3, 1955, Paragraph 9485, Commerce Clearing House Federal Tax Service, 1955.

The Tax Court itself found, after the introduction of evidence by petitioners, that the beginning net worth of the petitioners as of December 31, 1937 amounted to $169,949.85 as compared to $84,033.59, as determined by the Commissioner. Thus, it is apparent that the Commissioner's original determination was arbitrary and excessive and under these circumstances the petitioners were not required to establish the correct amount that might be charged against them. It was sufficient for the petitioners to show that the respondent's determination was invalid. *Taylor* v. *Commissioner,* supra; *Thomas* v. *Commissioner,* supra; *Durkee* v. *Commissioner,* 162 F. (2d) 184, 187 (CA 6, 1947).

The Court below erred by failing to remand the case to the Tax Court for the correction of the errors outlined hereinabove. *Taylor* v. *Commissioner,* supra, *Thomas* v. *Commissioner,* supra, *Durkee* v. *Commissioner,* supra.

III.

It is respectfully submitted that the Court below erred by sustaining the Tax Court in disregarding the unrebutted testimony of petitioners' duly qualified expert witnesses as to the fair market value of the assets of Warner Ice Company as of June 30, 1937. It was essential to find the fair market value of said assets at that given date to determine the gain or loss upon the sale of the Warner Ice Company by petitioners during the year 1941. (Opinion of the Court of Appeals, App., infra, p. 5, R. 155).

The Tax Court simply made a finding that assets of Warner Ice Company as of June 30, 1937 "had a fair market value of $36,000". It did not explain how such a value was reached. The only evidence offered as to fair

market value at the basic date was that of petitioners. The Tax Court merely reached an "independent conclusion of its own", disregarding all of petitioners' evidence.

We think that the decision of the Court of Appeals, approving the determination of the Tax Court, is contrary to well settled law and in conflict with the following decisions of the Eighth, Sixth, Third, Ninth, First and Second Circuits and the Court of Appeals for the District of Columbia, as developed herein as follows:

"It Is Reversible Error for the Tax Court to Disregard Competent, Relevant Testimony When It Is Uncontradicted."

The above heading is quoted from the opinion of the Court of Appeals for the Eighth Circuit in *Planters Operating Co.* v. *Commissioner*, 55 F. (2d) 583, and is a rule which is well established by the decisions of the United States Courts of Appeal. It is the duty of the Board of Tax Appeals, now Tax Court, to decide a case in accordance with the proof before it and it is error to fail to consider the unrebutted evidence of a taxpayer. *Rookwood Pottery Co.* v. *Commissioner*, (C.A. 6) 45 F. (2d) 43.

It is reversible error for the Tax Court to disregard competent, relevant and material evidence introduced by a taxpayer and to reach "an independent conclusion of its own". *Boggs & Buell* v. *Commissioner*, 23 F. (2d) 859; *Pittsburgh Hotel Co.* v. *Commissioner*, 43 F. (2d) 859; *Pittsburgh Hotel Co.* v. *Commissioner*, 43 F. (2d) 345 and *Nichols* v. *Commissioner*, 44 F. (2d) 157. (Decisions of the Third Circuit.) The rule has been applied in other circuits in the following cases: *Belridge Oil Co.* v. *Commissioner* (C.A. 9), 85 F. (2d) 762; *Citrus Soap Co.* v. *Commissioner* (C.A. 9), 42 F. (2d) 372; *Buena Vista Land & Dev. Co.* v. *Lucas* (C.A. 9), 41 F. (2d) 131; *Royal Packing Co.* v. *Commissioner* (C.A. 9), 22 F. (2d) 536; *Conrad & Co.* v. *Commissioner* (C.A. 1), 50 F. (2d) 576; *Bowitt*

Teller & Co. v. *Commissioner* (C.A. 2), 53 F. (2d) 381; *Pflegher Hardware Specialty* v. *Blair* (C.A. 2), 30 F. (2d) 10; *Planters Operating Co.* v. *Commissioner* (C.A. 8), 55 F. (2d) 583; *Dempster Mill Mfg. Co.* v. *Burnet* (Ct. of App., D.C.), 46 F. (2d) 604.

In *Nichols* v. *Commissioner,* supra, the Court summarized the testimony and stated:

> "This testimony overcame the presumption arising from the determination of the Commissioner. The burden then shifted to the Commissioner to support his determination by evidence, and this he did not do nor attempt to do, and accordingly his determination cannot stand. United States v. Rindskopf, 105 U.S. 418, 26 L. Ed. 1131; Thompson Pottery v. Routzahn, (D. C.), 25 F. (2d) 897; Flannery v. Willcuts (C.C.A.) 25 F. (2d) 951; Briggs Manufacturing Co. v. United States (D.C.), 30 F. (2d) 962.
>
> "The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its own findings are not predicated upon any substantial evidence, and therefore its redetermination is set aside, the determination of the Commissioner reversed, and the income tax returns of the petitioner approved."

Petitioners' experts testified in open court and their testimony was admitted in evidence. Respondent did not offer any testimony to rebut the evidence of petitioner's witnesses as to the fair market value of the Warner Ice Company as of June 30, 1937.

The lowest fair market value for the plant and machinery of the corporation as given by petitioners' experts was $75,000.

The following witnesses qualified as experts and testified specifically as to the fair market value of petitioners' ice plant at Cross Street as of June 30, 1937.

The expert witness Burgee, official Appraiser for the City of Baltimore, testified that the ground and improvements (the building) at 423-425 Cross Street had a fair market value of $30,000 in fee simple (R. 81).

The expert witness Allen Kenny, Superintendent of

Manufacturing for the American Ice Company, testified that the fair market value of the plant at Cross Street as of 1937 would be $75,000 (R. 88).

The expert witness Hanneman, of Waltham Welding Works, Baltimore, Maryland, testified that he made a test in 1937 to determine the capacity of petitioners' ice plant at Cross Street; that a five day test at five different temperatures was made and that the plant had a ninety ton per day capacity (R. 79). The witness testified that the fair market value of the plant as of June 30, 1937, based upon the capacity of ninety tons per day, was $78,000 (R. 79).

The testimony of Mr. Hanneman was based not only upon his expert knowledge but on personal knowledge due to the fact that he had tested the plant in 1937.

Both Hanneman and Kenny testified as to the fair market value of the entire plant (buildings and machinery) as a going concern. Burgee testified as to the fee simple fair market value of the ground and building. The Tax Court allowed only $36,000 as the fair market value, less than half of the value testified to by the experts, and only $6,000 in excess of the value of the ground and building thereon in fee simple as testified to by Burgee.

In this case we have a situation where the Tax Court finds a fair market value of $36,000 for the assets of Warner Ice Company as of June, 1937 without explaining how it reached such a value and with no evidence in the case to support such a value.

It seems clear from the record why the respondent introduced no evidence whatever as to the fair market value of the Warner Ice Company assets as of June, 1937. The Commissioner erroneously determined that the proper basis for determining gain or loss was the cost of these assets; not their fair market value as of June, 1937. The Tax Court, however, reversed the position of the Commissioner as a matter of law and held that the fair market value of the Warner Ice Company assets as

of June, 1937 was the correct basis for determining gain or loss rather than the cost of these assets. The Tax Court said (R., p. 28):

• • • •

> "Moreover, in connection with the assets formerly in the hands of the Warner Ice Manufacturing Corporation, it must be remembered that the corporation was liquidated on July 1, 1937. That liquidation was a taxable transaction and the assets thereupon took on a *new* basis, namely, their then market value." (Emphasis supplied.)

• • • •

We most respectfully submit that the sanction by the Court of Appeals of the Tax Court's departure from the accepted and usual course of judicial proceedings calls for an exercise of this Court's power of supervision.

CONCLUSION

Petitioners respectfully submit that this Honorable Court should grant the petition for a writ of certiorari

Respectfully submitted,

LLEWELLYN A. LUCE,
937 Munsey Building,
Washington 4, D. C.

WALTER H. MALONEY,
526 Investment Building,
Washington 5, D. C.
Counsel for Petitioners.

CERTIFICATE

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a writ of certiorari well founded and that it is not interposed for the purpose of delay.

LLEWELLYN A. LUCE

WALTER H. MALONEY.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6934.

MORRIS LIPSITZ, and
MORRIS LIPSITZ and HELEN LIPSITZ,
Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITIONS TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES.

(Argued March 7, 1955. Decided April 12, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

Llewellyn A. Luce (Walter H. Maloney on brief) for Petitioners; and Robert B. Ross, Special Assistant to the Attorney General, (H. Brian Holland, Assistant Attorney General; Ellis N. Slack and Robert N. Anderson, Special Assistants to the Attorney General, on brief) for Respondent.

DOBIE, Circuit Judge:

These are appeals from judgments of the Tax Court of the United States against Morris Lipsitz (hereinafter

called Lipsitz) individually for the years 1938, 1939, 1940, 1941 and 1944, and against Lipsitz and his wife, Helen Lipsitz, for the years 1942 and 1943. The Tax Court found deficiencies in tax for each of these years and also assessed fifty percent fraud penalties for each year.

Lipsitz and Helen Lipsitz have appealed to us and have raised two main questions. First, did the Tax Court erroneously attribute income to Lipsitz that arose from property owned by him and his wife as tenants by the entirety? Second, was there error in the Tax Court's findings of fact as to the value of certain assets sold by Lipsitz in 1941? Since we think the Tax Court correctly ruled on these and all other points raised by these appeals, its decision must be affirmed.

This case was presented by the Commissioner on a net worth basis since Lipsitz had no proper records or books. The evidence and exhibits are quite voluminous and we will not detail them here except as relevant to the particular questions raised. The record before us shows that during the years 1938 through 1944 Lipsitz and his wife owned a substantial amount of property as tenants by the entirety. In determining deficiencies against Lipsitz for the years in which he filed individual returns, the Tax Court treated all income earned on assets owned by Lipsitz and his wife as being taxable to Lipsitz. Lipsitz now contends that he should have been taxed upon only half the income from property owned by him and his wife as tenants by the entirety.

It is well settled that the measure of title, and the rights thereto incident, in property held by husband and wife under a tenancy by the entirety, are to be determined here by the law of Maryland. And under that law, each spouse, husband and wife, is ordinarily entitled each to one-half of the income from such property. *Masterson* v.

Masterson, 129 Md. 167, 98 Atl. 537. In *Saulsbury* v. *Commissioner,* 27 B. T. A. 744, the head-note reads:

> "The petitioner and his wife, residents of Maryland, owned personal property as tenants by the entirety. *Held* that *in the absence of an agreement between them for the distribution of the earnings on a contrary basis,* the husband is taxable on one-half of the income from such property." (Emphasis added.)

It was also stated in the opinion: "It does not appear, and it is not claimed, that such an agreement was ever entered into." In *Brell* v. *Brell,* 143 Md. 443, 122 Atl. 635, it was held that where proceeds from a farm owned by husband and wife were paid to the husband, with the acquiescence of the wife, who likewise acquiesced in the application of the proceeds to a debt due one of her sons and the payment of their living expenses, in the absence of an express promise by the husband to repay the amount paid to the son and for living expenses, there is no implied obligation on his part to do so. See, also, *Jenkins* v. *Middleton,* 68 Md. 540, 13 Atl. 155; *Farmers & Merchants National Bank* v. *Jenkins,* 65 Md. 245; 3 Atl. 302.

We think here there was a clear agreement between husband and wife, followed by a long continued practice, that the income from these properties held under a tenancy by the entirety, should be considered in all respects as the income of the husband. He completely controlled the properties, made all decisions as to the purchase and sale of the properties. Indeed, Mrs. Lipsitz had so little connection with these properties that she failed to appear at the lengthy trial before the Tax Court. In reality, it was the husband who actually earned this income. There is nothing in the record to indicate that Mrs. Lipsitz either paid any commission to her husband for her share of the rentals collected or compensated him for his labor, materials and business acumen in the premises.

Further, Lipsitz again and again testified that he considered this income as his own. For example, in response to a question, he stated: "It didn't belong to me, it belonged to my wife. *It is mine just the same.*" (Italics ours.) In colloquy between counsel for Lipsitz and the Court this interchange occurred:

> The Court: "Now do I understand both parties to agree that the assets of both these Petitioners may be considered together?"
>
> Mr. Luce: "Yes, your Honor; and it is the way the net worth statements have been set up."

In the light of all these circumstances, we find no reversible error in the action of the Tax Court, which treated the income from the properties held by Lipsitz and his wife under a tenancy by the entirety, as the income of Lipsitz alone.

We now turn to the second error alleged by Lipsitz. In 1933 Lipsitz and Louis Shane organized the Warner Ice Corporation, with each of them owning one half of the capital stock. This corporation functioned until June, 1937, when Lipsitz and Shane had a disagreement which culminated in the purchase of Shane's half interest in the corporation by Lipsitz who then became the sole stockholder. He immediately dissolved the corporation, transferring all of its assets to himself and his wife. Lipsitz continued in the ice business as the Warner Ice Company until 1941, at which time he sold his entire interest in the business, including the assets required on dissolution of the Warner Ice Corporation, to the Merchants Terminal Corporation for $57,500. Lipsitz reported no income from the sale of these assets, contending that he had suffered a capital loss. The Tax Court found, however, that there had been a capital gain of $17,357.49 from the sale of this property. Although Lipsitz contends that this finding is

erroneous, we think that the record before us amply supports the Tax Court.

The differenec of opinion arose over the computation of a basis for the calculation of gain or loss from the sale of the assets in 1941. Lipsitz contended that this basis was $108,951.76, resulting in a capital loss. The Tax Court found, however, that the basis of these assets actually was only $40,142.51. We think that this finding has ample support in the record.

The greater portion of the property sold by Lipsitz in 1941 was acquired by him from dissolution of the Warner Ice Corporation in 1937. This dissolution was a taxable transfer, and the property acquired by Lipsitz would take as its basis its fair market value at the time of the dissolution. The Tax Court found this value to be $36,000. Since this value has great relevancy in determining the basis of the property sold in 1941, a great deal of evidence was entered concerning fair market value of this property in 1937.

Lipsitz had purchased Shane's half-interest in this property immediately prior to dissolution of the Warner Ice Corporation in 1937. He transferred certain property to Shane for the purchase price. The Tax Court found that this property, land, buildings and machinery, had a value of $22,300. Lipsitz contends that this figure does not include the expense of improvements made by him on the property. This is not true; the Tax Court credited Lipsitz with these improvements but did not accept his figures as to their cost, which figures were based on the cost of such improvements if made by contractor.

The record shows that these improvements were made by Lipsitz, aided by his son and using materials obtained at wholesale prices. In view of this, the Tax Court's finding was quite proper. Also, Lipsitz included in his valua-

tion of the property transferred to Shane a $6,800. item for machinery and equipment. This is not proper, as the Tax Court held, since the record shows that this equipment was originally purchased by Shane and, therefore, could not be considered as any part of the consideration paid to Shane. In the light of this finding as to the cost of a half-interest in the assets purchased in 1937, and in view of other evidence in the record, the Tax Court was quite correct in finding that the property received in 1937 from the Warner Ice Corporation had a fair market value of $36,000.

In addition to these assets bought from the Warner Ice Corporation, Lipsitz in 1941 sold other properties to Merchants Terminal Corporation which he had purchased for his ice business between 1937 and 1941. The Tax Court's valuation of these assets is supported by the record. One item bears mentioning, however. Lipsitz contends that the value of certain property located at 423-425 West Cross Street should have been included, in addition to the value of the Warner Ice Corporation's property, in the valuation of property purchased by Merchants Terminal Corporation. The record shows, though, that this property was deeded to the Warner Ice Corporation by Lipsitz in March, 1933, and, therefore, was included in the $36,000. valuation of assets received from the Warner Ice Corporation by Lipsitz in 1937.

The Tax Court accepted Lipsitz's evidence as to the purchase of other assets between 1937 and 1941, which were transferred in 1941, but reduced his valuation of these assets. In view of the record before us, we feel that the Tax Court was correct in its findings. Cases of this nature are always difficult. The taxpayer has kept no accurate records, and as a consequence the valuation of property bought or sold many years previously is quite difficult. Where there is evidence to support its findings,

we cannot say the Tax Court erred in assigning a particular value, merely because the taxpayer says that value is incorrect. It may be of some consolation to the taxpayer if he realizes that a properly kept set of books could have helped immeasurably.

Lipsitz further contends that there was no proof of fraud on his part. We think there was ample evidence of fraud before the Tax Court. Not only does the record show a consistent under-statement of income over a long period of years but it also shows that he purchased property under the fictitious names "Fred Jacobs," "Vernon Birk," and "Morton Lipps." Also, in 1942 Lipsitz and his wife purchased properties in the names of "Morton" and "Loraine Pilstiz." In 1942, 1943, 1944 and 1945 Lipsitz directed the filing of tax returns under the name of Pilstiz; his son signed the first three returns and his wife signed the 1945 return.

When questioned about these returns, Lipsitz told a story which he later admitted to be false. In many of his business transactions, he was shifty, cunning and evasive. The Tax Court found many of the customary badges of fraud and observed: "We are satisfied that he did not have scrupulous regard for the truth * *. We do not believe his explanation that he had no cancelled checks or stubs." We think, reviewing all the evidence, that the Tax Court had before it ample proof of fraud.

Lipsitz also complains that the Tax Court did not credit him with $25,000 in cash as of December 31, 1940, which Lipsitz testified he had in a vault. The Tax Court is not required to believe the uncorroborated story of the taxpayer and was quite correct in refusing to credit this testimony here, since Lipsitz had made a prior inconsistent statement that the cash had been dissipated, which he failed to explain.

The other points raised by Lipsitz are not worthy of extensive treatment here. Suffice it to say that none of these points, all dealing with findings of fact by the Tax Court, has any merit.

For the reasons stated above, the decisions of the Tax Court are affirmed.

Affirmed.

Judgment

Filed and Entered April 12, 1955
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 6934

Morris Lipsitz, and Morris Lipsitz and Helen Lipsitz, Petitioners,

v.

Commissioner of Internal Revenue, Respondent

On Petitions to Review the Decisions of the Tax Court of the United States.

This Cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decisions of the said The Tax Court of the United States, in this cause, be, and the same are hereby, affirmed.

April 12, 1955

ARMISTEAD M. DOBIE
United States Circuit Judge.

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 6934.

Morris Lipsitz, and Morris Lipsitz and
Helen Lipsitz, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

On Petitions to Review the Decisions of the Tax Court
of the United States.

Upon the petition of the petitioners, by their counsel, and it appearing that on May 11, 1955, they filed a petition for a rehearing in the above entitled case,

It is now here ordered that the mandate in this case be, and the same is hereby, stayed pending the action of the Court on the said petition for a rehearing.
May 13, 1955.

JOHN J. PARKER
Chief Judge, Fourth Circuit.

A true copy,
Teste:

/s/ Richard M. F. Williams, Jr., Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 6934.

Morris Lipsitz, and Morris Lipsitz and Helen Lipsitz, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

On Petitions to Review the Decisions of the Tax Court of the United States.

This Court having rendered its decision affirming the decisions of the Tax Court of the United States, and the Petitioners having on May 11, 1955, presented to the Court a petition for a rehearing of said cause, and same having been fully considered:

It is now here ordered that the rehearing asked for be and same is hereby denied.

JOHN J. PARKER
Chief Judge, Fourth Circuit.
MORRIS A. SOPER
United States Circuit Judge.
ARMISTEAD M. DOBIE
United States Circuit Judge.

FILED May 18 1955 R. M. F. Williams, Jr., Clerk

A true copy,
Teste:

/s/ Richard M. F. Williams, Jr., Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 311

MORRIS LIPSITZ AND MORRIS LIPSITZ AND HELEN LIPSITZ, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 2–33) are reported at 21 T. C. 917. The opinion of the Court of Appeals (Pet. App. 1A–8A) is reported at 220 F. 2d 871.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1955. (Pet. App. 8A.) The taxpayers, on May 11, 1955, filed a motion for rehearing which was denied by the Court of Appeals on May 18, 1955. (Pet. App. 10A.) The petition

for a writ of certiorari was filed on August 11, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court below erred in concluding that the particular circumstances of this case warranted the Tax Court in treating as taxable to the taxpayer-husband income from certain properties held by him and his wife as tenants by the entirety.

2. Whether the increases in the taxpayer's net worth were distorted because of the omission of certain properties from the starting point of the net-worth computations.

3. Whether the court below erred in sustaining the Tax Court's finding as to the fair market value of the assets of the Warner Ice Company when they were acquired by the taxpayer in 1937.

STATUTES INVOLVED

The pertinent statutory provisions involved, Sections 21, 22, 41 42, 54, and 293 of the Internal Revenue Code of 1939, are set forth in the Appendix, *infra,* pp. 12–14.

STATEMENT

This case involves income tax deficiencies and 50% fraud penalties against Morris Lipsitz (herein referred to as the taxpayer) for the calendar years 1938, 1939, 1940, 1941, and 1944 in which he filed separate returns, and against the tax-

payer and Helen Lipsitz, his wife, for the calendar years 1942 and 1943 in which they filed joint returns. (R. 3, 33–35.) The deficiencies were arrived at by the use of the so-called net-worth method because of the taxpayer's failure to keep adequate books and records. (R. 24.) A number of issues were raised by the taxpayer in the Court of Appeals relating not only to the Commissioner's use of the net-worth method, but also to several of the items entering into the net-worth computation and the Tax Court's finding that the deficiencies were due to fraud.

The petition for certiorari does not challenge the decision below upon most of these points, but is concerned principally with the treatment accorded income from property held by the taxpayer and his wife as tenants by the entirety, and the valuation of certain assets received by the taxpayer from the Warner Ice Company in 1937. The facts relevant to these issues may be summarized as follows:

The taxpayer and his wife resided in Baltimore, Maryland, during the years involved. (R. 3.) Commencing about 1920 the taxpayer invested in real estate in that city. He purchased many properties which he rehabilitated and made available for rental. (R. 4.)

From 1932 to 1941 the taxpayer was also interested, among other businesses, in the ice business. (R. 4.) On March 28, 1933, the Warner Ice Com-

pany completed incorporation and, except for qualifying shares, its stock was owned in equal amounts by the taxpayer and his brother-in-law, Louis Shane. Certain properties in which the taxpayer and his wife had interests were transferred to the corporation and were used in connection with the operation of the ice plant. Other properties were improved for use as ice stations, that is, refrigerated buildings for the storage of ice. About the middle of 1937 the taxpayer and Shane came to a parting of the ways and undertook to divide the assets of the ice business. The taxpayer acquired Shane's half interest in the stock of the corporation and, in turn, transferred to Shane certain real properties. Upon becoming sole stockholder in 1937, the taxpayer caused the corporation to be liquidated and thereafter continued to operate the business as a sole proprietorship. Thereafter, he made several additions and improvements in connection with the business. On May 1, 1941, the taxpayer and his wife sold all their interests in the properties used in the ice business to the Merchants Terminal Corporation for $57,500. (R. 4, 10–13.)

The sale of the ice plant properties in 1941 was not reported by the taxpayer and his wife in any of their federal income tax returns. The Tax Court concluded that the acquisition of such of these properties as were acquired by the liquidation of the corporation in 1937 constituted a taxable transaction so that the assets took on a new

tax basis consisting of their then fair market value. It found that such properties had a fair market value of $36,000 at that time. (R. 12, 13, 28.) The Tax Court found that there was a capital gain of $17,357.49 from the sale of these properties, and the Court of Appeals affirmed. (Pet. App. 4A–7a.)

The taxpayer's affairs were often conducted in a secretive and confusing manner. He and his wife had interests in real estate in the names of nonexistent or fictitious persons. (R. 27.) During the taxable years involved they owned a substantial amount of property as tenants by the entirety. (Pet. App. 2A.) Among these were rental properties consisting of fee-simple interests in lands and buildings and leasehold interests in lands subject to ground rent upon which buildings owned by the taxpayer and his wife were located. They also included certain properties which were used in the various businesses of the taxpayer, including the ice business above referred to. (R. 5, 7–10.)

In certain of the taxable years involved the taxpayer filed separate returns in which he treated income from properties held by the entirety as his own. Consistent therewith, both in his net-worth statement and that of the Commissioner, all of the income from the properties held by the entirety was included for such years. The case was unambiguously presented to the

Tax Court by counsel for both sides on the basis that the net-worth statement of both spouses was to be used for all the years in controversy, even though the taxpayer's liability alone was involved for the years in which he filed separate returns. The taxpayer repeatedly testified that he considered as his own the income in question. The Tax Court treated such income accordingly. (R. 24–25, fn. 1.) The court below affirmed. (Pet. App. 2A–4A.)

ARGUMENT

This case presents only factual issues and raises no question of law warranting review by this Court. There are no conflicting decisions.

1. There is no merit in the contention (Pet. 7–16) that the decision below, in taxing to the taxpayer-husband in the years 1938, 1939, 1940, 1941, and 1944 in which he filed separate returns income from property held by the entirety, is contrary to this Court's decisions in *Poe* v. *Seaborn,* 282 U. S. 101; *Goodell* v. *Koch,* 282 U. S. 118; *Hopkins* v. *Bacon,* 282 U. S. 122; and *United States* v. *Malcolm,* 282 U. S. 792, dealing with the taxation of community income in community property States. The decision below turned upon the particular facts of this case. The appellate court was fully cognizant of the necessity for considering the applicable state law, here the law of Maryland, in determining the question of ownership of income from property held by the

entirety. It was equally aware that in ordinary circumstances under Maryland law each spouse is entitled to one-half of the income from property held under a tenancy by the entirety. (Pet. App. 2A–3A.) However, under Maryland law the spouses can vary this result if they choose by an understanding evidenced by either an agreement or merely by their conduct. *Brell* v. *Brell,* 143 Md. 443; *Jenkins* v. *Middleton,* 68 Md. 540; *Farmers & Merchants' Nat. Bank of Balto.* v. *Jenkins,* 65 Md. 245. The court below found such an agreement in this case, and its decision is based upon the particular circumstances involved. Its ruling upon such a determination of local law by a Court of Appeals raises no question warranting review. *Ragan* v. *Merchants Transfer Co.,* 337 U. S. 530, 534, rehearing denied, 338 U. S. 839.

The court below properly concluded (Pet. App. 3A) that there was an understanding between the spouses with respect to the ownership of the income from property held by the entirety as evidenced by their course of conduct with respect to the operation of the properties and the income therefrom. For example, the taxpayer testified that he became "sole owner" (Tr. 204) of the Warner Ice Company in 1937, the properties of which were allegedly held by the entirety. Furthermore, after liquidating the corporation in 1937, he continued to operate the ice company as

an individual business until May 1, 1941. (R. 12–13.) The court below from a consideration of the whole record found that the taxpayer completely controlled the properties, made all decisions as to purchases and sales thereof, and in reality actually earned the income involved. As the court pointed out, Mrs. Lipsitz had so little connection with the properties and businesses which were productive of the income involved that she even failed to appear at the lengthy trial before the Tax Court. The taxpayer again and again testified that he considered as his own the income in question. (Pet. App. 3A–4A.)

It appears further that before the Tax Court the taxpayer agreed that that court might properly treat the properties held by the entirety and the income therefrom in the manner in which it did. (R. 24–25, fn. 1.) Thus, he is scarcely in a position to question the correctness of the decision below on this aspect of the case.

2. That portion of the decision below dealing with the increase in the taxpayer's net worth during the taxable years involved is not in conflict with the decisions in *Holland* v. *United States,* 348 U. S. 121, rehearing denied, 348 U. S. 932; *Smith* v. *United States,* 348 U. S. 147; *Marcella* v. *Commissioner,* 222 F. 2d 878 (C. A. 8th); *Thomas* v. *Commissioner,* 223 F. 2d 83 (C. A. 6th). The *Holland* and *Smith* cases were criminal cases. Consequently, in developing the net-

worth increases of the respective defendants the Government bore a completely different burden from that in the present case. Here the Commissioner's determination, except with respect to the issue of fraud, is presumed to be correct and the taxpayer had the burden of proving it wrong. The *Marcella* and *Thomas* cases turned upon completely different factual situations from that involved here.

The taxpayer's contention (Pet. 18–19) that there was a distortion of the increase in his net worth because of the failure of the Commissioner to allow him credit with respect to certain Whatcoat Street properties at the beginning point of the net-worth computations was not presented to the court below. In any event, the extent of the increase in his net worth was a matter for resolution by the trier of the facts and presents no issue reviewable here.

3. The lower court correctly held that the Tax Court was not obliged to accept the opinion testimoney of the taxpayer's expert witnesses as to the fair market value of the Warner Ice Company properties at the time of their acquisition by the taxpayer upon the liquidation of that company in 1937. It is well settled that opinion testimony is merely advisory and, even though uncontradicted, is not binding upon the Tax Court. *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 627–628; *Dayton P. & L. Co.* v. *Commis-*

sion, 292 U. S. 290, 299; *Fox River Paper Corp.* v. *United States,* 165 F. 2d 639, 641 (C. A. 7th); *Gloyd* v. *Commissioner,* 63 F. 2d 649 (C. A. 8th), certiorari denied, 290 U. S. 633; *Tracy* v. *Commissioner,* 53 F. 2d 575 (C. A. 6th), certiorari denied, 287 U. S. 632; *Doric Apartment Co.* v. *Commissioner,* 94 F. 2d 895 (C. A. 6th). The Tax Court's valuation of the ice company properties was founded upon that court's view of the evidence. The Tax Court was impressed by the testimony regarding the increase which took place in the fair market value of similar properties between 1937 and 1941, the year of the commencement of the national emergency preceding World War II. The court accepted the amount of $57,000 for which the property was sold in 1941 as representing the fair market value at that time, and made the adjustments it thought necessary to compensate for the rise in value which occurred between that time and 1937, the year which the assets were acquired by the taxpayer. Its determination of the value of the property involved was based upon all of the relevant evidence in the record. (R. 28–29, fn. 2.) The Court of Appeals correctly concluded that the Tax Court's findings as to the fair market value of the properties in question are warranted by the record. (Pet. App. 4A–7A.)

This issue, as well as the other issues raised, turns upon the facts, as to which there was no disagreement between the trial and appellate

courts. A well-established rule of this Court makes concurrent findings of two courts below final in the absence of exceptional circumstances. *Comstock* v. *Group of Investors*, 335 U. S. 211, 214.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

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(26 U. S. C. 1952 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so

employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U. S. C. 1952 ed., Sec. 41.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

(a) [As amended by Sec. 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687] *General Rule.*—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 42.)

SEC. 54. RECORDS AND SPECIAL RETURNS.

(a) *By Taxpayer.*—Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

* * * * *

(26 U. S. C. 1952 ed., Sec. 54.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

* * * * *

(26 U. S. C. 1952 ed., Sec. 293.)

Sections 21, 22 (a), 41, 42, 54 (a), and 293 (b) of the Revenue Act of 1938, c. 289, 52 Stat. 447, applicable to the taxable year 1938, contain provisions identical with the corresponding sections of the Internal Revenue Code of 1939 above quoted.

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